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No. 108, Original

In The Supreme Court
Of The United States

October Term, 1986

STATE OF NEBRASKA,
Plaintiff,
v.
STATE OF WYOMING,
Defendant.

WYOMING MEMORANDUM IN OPPOSITION TO BASIN ELECTRIC POWER COOPERATIVE MOTION FOR LEAVE TO INTERVENE

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INTRODUCTION

Basin Electric Power Cooperative ("Basin") moves to intervene as a party defendant to protect its water supply from the Laramie River for its Laramie River Station power plant. The Answer which Basin seeks leave to file asserts that "Nebraska has no right to the waters of the Laramie River", and prays for an order "affirming Basin's rights to use water from the Laramie River . . . ". Basin Answer tendered with Motion for Leave to Intervene, at 17. Wyoming opposes intervention by Basin.

ARGUMENT

Basin's intervention is inappropriate for esstentially the same reasons that intervention by the Platte River Trust and the National Audubon Society is inappropriate. (The Court's attention is directed to Wyoming's Memorandum in Opposition to their Mo-

tions for Leave to Intervene.) Wyoming's sovereign responsibility to represent its citizens *parens patriae* in equitable apportionment proceedings insures that Basin's interest as an existing appropriator of Laramie River water in Wyoming will be adequately represented. What this Court said in deciding that the Secretary of Interior was not an indispensable party to the original North Platte River equitable apportionment proceeding applies equally to Basin here: "Wyoming will stand in judgment for him as for any other appropriator in that state". *Nebraska v. Wyoming*, 295 U.S. 40, 43 (1935).

Basin's interest in this proceeding is protection of the existing water supply for its Laramie River Station. The Laramie River Station is supplied primarily by water diverted and stored from the Laramie River under Wyoming water rights held by Basin, including water rights for Grayrocks Reservoir. Nebraska's Petition here alleges that Basin's depletions of the Laramie River by its operation of Grayrocks Reservoir violate Nebraska's rights under the North Platte Decree. Wyoming contends that Nebraska has no right to the Laramie under the North Platte Decree, and that this Court's Decree apportioning the Laramie between Colorado and Wyoming entitles Wyoming's appropriators to beneficially use all water remaining in the Laramie after Colorado's apportionment has been satisfied. *See* Wyoming Brief in Opposition to Motion for Leave to File Petition, at 6-7, 14-15; and Wyoming Answer to Petition, at 2-3, 5-6.

Thus, the issue before the Court is whether the North Platte Decree entitles Nebraska to any water from the Laramie River. Basin's position on this issue is the same as Wyoming's — that Nebraska has no right

to the Laramie River under the North Platte Decree. Basin is only one of many appropriators from the Laramie River in Wyoming. It requests the Court essentially to readjudicate its individual right to divert and store water. The proper role of the Court in this case is not to undertake such an intrastate adjudication, but only to determine the respective rights of Nebraska and Wyoming to the Laramie River. Basin's interests are adequately represented here by Wyoming *parens patriae*, as are the interests of all other Wyoming appropriators in the Laramie River and North Platte River basins.

Basin asserts that as the owner of water rights from the Laramie River and as a party to the Agreement of Settlement and Compromise limiting its use of those water rights to supply the Laramie River Station, it has a "compelling interest" entitling it to intervene. Its interest in its water supply certainly is no more compelling than Philadelphia's was in *New Jersey v. New York*, 345 U.S. 369 (1953). There, Philadelphia's intervention was denied because its interest in its water supply from the Delaware River was represented by Pennsylvania *parens patriae*. Here, Nebraska apparently does not even seek relief which would adversely affect Basin's water supply. Nebraska's concern appears to be about potential depletions by Wyoming appropriators other than Basin. Nebraska acknowledges that it is bound by the settlement agreement and apparently concedes that Basin's operation of the reservoir in compliance with the agreement does not violate the rights Nebraska claims. Nebraska's Reply to Wyoming's Brief in Opposition to Motion for Leave to File Petition, at 11-12.

Moreover, the agreement settling the litigation

between Nebraska, Basin and other parties is not relevant to the suit here, except to the extent that it precludes Nebraska from claiming that operation of the Laramie River Station or Grayrocks Reservoir in accordance with its terms violates Nebraska's rights. Wyoming is not a party to the settlement agreement. Wyoming's only obligation to Basin is to administer its water rights and other Wyoming water rights in accordance with Wyoming law. The agreement does not supersede Wyoming law. Any dispute relating to the agreement is not a controversy between Nebraska and Wyoming, and therefore does not lie within this Court's original jurisdiction.

To the extent that there might be a dispute between Basin and Wyoming over the administration of Basin's water rights, that involves solely questions of state law which can and should be decided by the Wyoming courts. *Arkansas v. Texas*, 346 U.S. 368 (1953). Similarly, to the extent that there might be a dispute between Nebraska and Basin regarding enforcement of the settlement agreement, this Court's exclusive original jurisdiction is not the proper forum for resolution of that dispute. The stipulation of the parties and the orders dismissing the suits to which the settlement agreement related provided for retention of jurisdiction by the U.S. District Court in Nebraska for purposes of enforcement and interpretation of the agreement. Appendix to Wyoming Brief in Opposition to Motion for Leave to File Petition, A-22, A-34 - A-35. For sound reasons, this Court has declined to extend its original jurisdiction in equitable apportionment cases to the kind of intramural dispute that would result from Basin's intervention. *New Jersey v. New York*, 345 U.S. 369 (1953); *Nebraska v. Wyoming*, 295 U.S. 40 (1935).

Nebraska acknowledges that Wyoming has no obligation under the settlement agreement, but asserts that Nebraska's rights **under the North Platte Decree**, independent of its rights against Basin under the settlement agreement, preclude Wyoming appropriators from further depleting the flows of the Laramie. Nebraska Reply to Wyoming's Brief in Opposition to Motion for Leave to File Petition, at 12. Nebraska argues, in effect, that although it cannot enforce the settlement agreement against Wyoming, it can reach the same result by enforcing its rights under the North Platte Decree.

The point is that the controversy between Nebraska and Wyoming here regarding the Laramie River relates only to their respective rights under the North Platte Decree. This is a suit for enforcement of the North Platte Decree, not enforcement of the settlement agreement. In litigating the conflicting claims of the two sovereign states to the Laramie River, Wyoming will stand in judgment for all of its appropriators, including Basin, just as Nebraska will stand in judgment for its. *Nebraska v. Wyoming, id.; New Jersey v. New York*, 345 U.S. 369, 372-73 (1953).

CONCLUSION

For the foregoing reasons, and those set forth in Wyoming's Memorandum in Opposition to Platte River Trust and National Audubon Society Motions for Leave to Intervene, the Motion for Leave to Intervene of Basin Electric Power Cooperative should be denied.

Respectfully submitted,

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